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August 8, 2012

Stephen S. Perkins, Director
Office of Ecosystem Protection
U.S. Environmental Protection Agency, Region I
Boston, MA 02109-3912

Dear Mr. Perkins:

I am writing in response to your July 9, 2012 letter in which EPA expresses the view that 12 M.R.S. § 6134(2) (the Alewife Law) effectively revised Maine's federally-approved water quality standards, and disapproves that provision for the purposes of the federal Clean Water Act ("CWA").

State Regulatory Jurisdiction over the St. Croix River Watershed

Before turning to your analysis and conclusions, your letter is an appropriate occasion to address EPA's apparent position that Maine's water quality standards do not apply to certain undefined and unidentified Tribal water bodies. In recent years EPA has refused to approve new and amended state water quality standards for "waters within Indian Territories and lands." EPA has never explained what waters it understands to be covered by that phrase, and instead has left the State, the Tribes, the regulated community and the public at large to wonder which water bodies are not, in the view of your agency, covered by these state laws of general application. EPA has also failed to explain what water quality standards, if any, apply to these unidentified water bodies, if it is indeed the agency's position that the State of Maine's standards do not. We are aware of no alternative source of water quality standards that would apply to such water bodies by default to fill the void that EPA's position creates. Moreover, as Maine has carried out its responsibilities in implementing the CWA for many years, EPA has never indicated that it should apply any standards to any water body other than the State's duly adopted standards. This too calls into question whether EPA means what it says when it takes the position that there is some set of unidentified water bodies within the State to which Maine's approved standards do not apply.

EPA's position on this issue is directly contrary to the Court's decision in *Maine v. Johnson*, 498 F.3d 37 (1st Cir. 2007). In *Johnson*, the First Circuit Court of Appeals vacated an EPA decision that carved out certain Tribal discharges from the scope of the agency's delegation of CWA permitting authority to Maine. In doing so the Court observed that the Maine Indian

Land Claims Settlement Act, and particularly the Maine Implementing Act at 30 M.R.S. § 6204, is “about as explicit ... as is possible” in conferring environmental regulatory authority on the State over Indian lands and waters. *Johnson*, 498 F.3d at 43. Maine challenged EPA’s action in the *Johnson* case in order to clarify this jurisdictional issue once and for all, and the Court’s decision could not have been more emphatic in providing that clarity. For EPA to continue to suggest that Maine’s regulatory jurisdiction does not reach “waters within Indian Territories and lands” following the *Johnson* decision is indefensible. It raises false expectations, creates confusion where none should exist, and generally does a great disservice to the State as it works in good faith to carry out its CWA responsibilities, as well as to all parties that must in some way order their lives around CWA compliance obligations in the vicinity of Indian Territory in Maine.

Your letter on the Alewife Law makes no mention of this jurisdictional issue despite the fact that the St. Croix River flows past portions of the Passamaquoddy Indian Reservation, 30 M.R.S. § 6203(5), and Passamaquoddy Indian Territory. 30 M.R.S. § 6205(1). The analysis set forth in your letter assumes State authority to adopt and apply water quality standards for federal CWA purposes in the St. Croix River Watershed. This is true because your conclusion that the Alewife Law conflicts with certain of Maine’s federally-approved water quality standards applicable to the St. Croix Watershed assumes that Maine had authority to adopt such standards in the first place. By reviewing and disapproving the Alewife Law, EPA has recognized Maine’s authority to adopt water quality standards governing the St. Croix Watershed for the purposes of the CWA. Therefore, at least as to this Watershed, we expect EPA will never suggest that Maine’s environmental regulatory jurisdiction is in question.

EPA’s Disapproval of the Alewife Law for Federal Clean Water Act Purposes

In its substance, your letter addresses unique circumstances in which, among other things: (1) a state statute requires affirmative actions to be taken to prevent the migration of a native, anadromous species past a dam to reach its historic spawning grounds, and (2) that species already has clear migratory access to the dam site and is actually present there in substantial numbers. You conclude that such a statute “constitutes a de facto revision of the narrative criteria at 38 M.R.S. §§ 465(1)(B)&(2)(B),” which specify that the aquatic life in this water body be “as naturally occurs,” because it affirmatively provides that alewives shall not be present. You disapprove the Alewife Law as insufficiently protective of a designated use within Maine’s federally approved water quality standards pursuant to EPA’s authority under Section 303(c) of the CWA and 40 CFR Part 131.

We note that EPA’s disapproval of the Alewife Law does not purport to render the statute invalid as a matter of State law. Instead, consistent with the limits on its authority, EPA has simply disapproved the Alewife Law for discrete federal CWA purposes. This means, for example, that the State may not apply the Alewife Law in the course of issuing CWA discharge permits. The State has always regarded the Alewife Law to be a fisheries management measure with meaning and effect only in that context; it has never considered the statute to be a CWA water quality standard. Therefore, it appears that EPA’s action merely prevents Maine from doing something that it has never done, has never tried to do, and has no intention of doing, which is to apply the Alewife Law for CWA purposes.

Your letter concludes by encouraging Maine to take "appropriate action to authorize passage of river herring to portions of the St. Croix River above the Grand Falls Dam." We have consulted with the Office of Governor Paul R. LePage, who has been engaged in discussions about this issue for many months with stakeholders. We have been informed that Governor LePage's Administration is committed to pursuing implementation of the Alewife Adaptive Management Plan that has been proposed to the International St. Croix Watershed Board. If EPA has policy-based concerns about that plan, it could share them with Administration officials, and could also participate in the legislative process that will likely occur in connection with that effort.

Thank you.

Sincerely,

A handwritten signature in black ink, appearing to read "Will Schneider", written over the printed name.

WILLIAM J. SCHNEIDER
Attorney General